(1) Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

BRONNER BROS., INC.,

Petitioner,

v.

TERI M. BLOUNT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a district court, before entering a default judgment, must make specific factual findings with respect to the factors purportedly supporting its entry of a default judgment.

II. Whether a district court, before entering a default judgment based on Petitioner's failure to answer Respondent's complaint on time, must first consider imposing a less severe sanction.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

Petitioner, Bronner Bros., Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Court of Appeals below is reported at 199 F.3d 443 (Table) (11th Cir. 1999) (App. A.) The order of the United States District Court for the Northern District of Georgia, denying Bronner Bros.' Rule 55(c) Motion to set aside default and directing entry of default judgment against Bronner Bros. as to liability, was dated September 16, 1996 (App. B.)

STATEMENT OF JURISDICTION

This petition seeks review of the Eleventh Circuit panel's October 14, 1999, decision affirming the district court's judgment. The panel denied Bronner Bros.'s petition for rehearing and rehearing *en banc*, by order dated January 14, 2000 (App. D.) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

"*Setting Aside Default*. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Fed. R. Civ. P. 55(c).

STATEMENT OF THE CASE

Respondent, Teri M. Blount ("Blount"), filed this employment discrimination action against Petitioner, Bronner Bros., Inc. ("Bronner Bros.") in the U.S. District Court for the Northern District of Georgia, invoking the district court's jurisdiction under 28 U.S.C. § 1331. Blount's Complaint was based entirely on the alleged actions of Bernard Bronner, the President and CEO of Bronner Bros., who was not a party to this lawsuit. Specifically, Blount

claimed that Bernard Bronner sexually harassed her and then fired her in retaliation for complaining about the harassment. Blount's Complaint stated sexual harassment and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as three supplemental claims under Georgia law. The Complaint sought more than $500,000 in damages.

As set forth below, the district court eventually entered judgment in Blount's favor in the amount of $331,687.35. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court in an unpublished opinion (App. A.) Bronner Bros. petition for rehearing and rehearing *en banc* was denied in a *per curiam* opinion. (App. D.) Bronner Bros. now respectfully petitions this Court for a writ of certiorari to the Eleventh Circuit.

A. Background of Bronner Bros. and Bernard Bronner[1]

Bronner Bros. is a privately-held, African-American owned company which has been selling hair care products since 1947. The company was started by Bernard Bronner's father in 1947 as a distributor of haircare products to beauty salons. The company, over its long history, has evolved from a small distributorship to a manufacturer of more than 100 haircare products. The company has six shareholders and approximately 350 employees. Bernard Bronner has been the President and CEO of Bronner Bros. since 1993.

B. Bronner Bros.' Default

In this case, Bronner Bros. made a mistake. The Company had very little experience with the legal system. When sued by Blount, it did not immediately retain an attorney and did not effectively respond to the Complaint in

1. All facts set forth herein are supported by the record and uncontradicted.

a timely fashion. Bronner Bros. ultimately retained attorneys and sought to correct its mistakes but by then several months had passed. In response to Bronner Bros.' mistake, the district court imposed the most severe possible sanction. It stripped Bronner Bros. of its ability to contest liability in the case by entering a default judgment that resulted in the allegations of that Complaint being treated at trial as the truth, regardless of what the truth actually was.

C. Procedural History

Bronner Bros. was served with Blount's Complaint on October 25, 1995. On or about November 14, 1995, Bronner Bros. served Blount with, and filed with the Court, a *pro se* request for an extension of time to answer until November 27, 1995. As explained more fully below, the issue of whether Bronner Bros. attempted to file an Answer on November 27, 1995 is disputed. It is undisputed that Bronner Bros. had not retained an attorney by November 1995. Nevertheless, Bronner Bros. maintains that it hand delivered a *pro se* Answer to the Court on that date. Bronner Bros. supported its contention in the district court with the uncontested affidavit of the Bronner Bros. employee who filed the Answer. However, the November 27, 1995, Answer is not on file with the district court. Bronner Bros. does not have a copy of it, and Bronner Bros. concededly did not serve the November 27, 1995, Answer on opposing counsel.

On January 19, 1996, Blount formally asked the Clerk to enter default against Bronner Bros. The Clerk entered default on February 5, 1996. On February 6, 1996, Blount moved for a default judgment as to liability. On February 29, 1996, the United States Magistrate Judge declared moot Bronner Bros.' November 14, 1995, request for an extension of time to answer and directed the Clerk to enter default against Bronner Bros. pursuant to Fed. R. Civ. P. 55(a). On

May 6, 1996, the Magistrate filed his Report and Recommendation ("the May 6 Recommendation"), recommending entry of a default judgment against Bronner Bros.

On May 22, 1996, Bronner Bros. appeared by counsel and filed an Objection to the May 6 Recommendation and Motion to Set Aside Entry of Default pursuant to Fed. R. Civ. P. 55(c) (the "Rule 55(c) Motion"), and a brief supporting its Rule 55(c) Motion and in Opposition to Blount's Motion for Default Judgment. Bronner Bros. also filed the supporting Affidavit of Bernard Bronner's assistant, Camille Binder. Ms. Binder testified that she had personally taken Bronner Bros.' *pro se* Answer to the Court for filing, that the Clerk's Office accepted the Answer, and that she periodically checked the status of the case by telephone. Ms. Binder testified that she was told when she called the Clerk's Office that the matter was pending in Court. Ms. Binder's affidavit included a number of important details such as the name of the person with whom she dealt in the Clerk's Office (Ms. Rivera) and a description of the Clerk's method of stamping and filing documents. No testimony controverting Ms. Binder's Affidavit was submitted to the Court.

In addition, on June 3, 1996, Bronner Bros. filed the Affidavit of Bernard Bronner to establish that it had a meritorious defense. Bronner swore that Blount's allegations were false and that he never engaged in unwelcome physical or verbal advances toward her. Bronner also swore that Blount never complained to him about any sexual harassment and that she was not discharged in retaliation for making any such complaints or for refusing to tolerate alleged sexual harassment.

Following Bronner Bros.' submissions, the presiding Senior District Judge ordered the Magistrate to make a new Report and Recommendation. On July 22, 1996, the Magistrate filed his Second Report and Recommendation (the "July 22 Recommendation") (App. C), recommending that Bronner Bros.' Rule 55(c) Motion be denied and that a default judgment be entered against Bronner Bros. Bronner Bros. then filed an Objection to the Magistrate's July 22 Recommendation. On September 18, 1996, the district court denied Bronner Bros.' Rule 55(c) Motion and directed entry of a default judgment against Bronner Bros. as to liability. In so doing, the district court adopted the Magistrate's July 22 Recommendation and rejected Bronner Bros.' objections.

D. Trial on the Issue of Damages

Because liability was deemed established by virtue of the default, the case went to trial solely on the issue of damages. By consent of the parties, the trial proceeded before the Magistrate.

Bronner Bros.' ability to defend itself was limited by the default. It was established by default that Bronner Bros. (1) allowed a sexually hostile environment to exist; (2) retaliated against Blount; (3) intentionally caused her severe emotional distress; (4) assaulted and battered Blount; and (5) negligently hired and retained Bernard Bronner. Bronner Bros. could not effectively attack Plaintiff's damages allegations in light of these admissions. Bronner Bros. was able to elicit some helpful information at the trial on damages. For example, Blount testified that her claims were based upon the conduct of Bernard Bronner during and immediately after the Black Expo, an annual trade show held in Washington, D.C.

Prior to the trade show, Blount had never been discriminated against by Bernard Bronner, or any other agent or employee of Bronner Bros. Blount was not aware of Mr. Bronner sexually harassing any other Bronner Bros.' employee.[2] Blount also testified that she never reported the alleged sexual harassment and retaliation to anyone at Bronner Bros. However, in the face of the admissions required in light of Bronner Bros.' initial mistakes, the impact of the evidence was lost.

At the close of the evidence, Bronner Bros. moved for judgment as a matter of law concerning Blount's claims for punitive damages. The Magistrate denied that motion, and the jury then awarded Blount $75,000 in compensatory damages and $200,000 in punitive damages. After trial, Blount moved for attorney's fees under 42 U.S.C. § 1988, for back pay and benefits, and for costs. On November 4, 1997, the court entered final judgment for the $75,000 compensatory damages and $200,000 punitive damages awarded by the jury, as well for as $9,978.40 in back pay, $2,578.95 in fringe benefits, $42,860.00 in attorney's fees, plus costs of $1,270.00 for a total judgment of $331,687.35.[3]

On November 14, 1997, Bronner Bros. filed a Renewed Motion for Judgment as a Matter of Law, Motion for New

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2. Blount testified at trial that she was aware of one allegedly inappropriate comment made by Bernard Bronner to one of Blount's co-workers. The evidence at trial showed, however, that Bernard Bronner did nothing more than joke to Shay Wesley that Bronner Bros.' new product, called "African Royale Shay Butter," had been named after Wesley — a comment about which Blount complained for some reason to a supervisor named Mona Singleton.

3. An Amended Judgment was entered on May 26, 1998. This amendment simply corrected the title of the presiding Magistrate, who had incorrectly been identified as "U.S. District Judge" in the original Judgment.

Trial, and Alternative Motion for Remittitur. The Magistrate denied those Motions on June 25, 1998. Bronner Bros.' Notice of Appeal to the United States Court of Appeal for the Eleventh Circuit was filed on July 21, 1998.

E. Proceedings in the Court of Appeals

Bronner Bros. appealed on the grounds that the district court erred in entering default judgment, in denying Bronner Bros.' Motion for Judgment as a Matter of Law as to punitive damages, and in denying Bronner Bros.' Motion for New Trial. Blount cross-appealed the amount of the award of attorney's fees.

On October 14, 1999, in a *per curiam* decision, the Eleventh Circuit affirmed the district court's judgment in all respects. (App. A.) The Eleventh Circuit recited a chronology of the case in its brief opinion, but did not explain its reasons for affirming the district court.

On January 14, 2000, in another *per curiam* opinion, the Eleventh Circuit denied the Petition for Rehearing and Rehearing *En Banc*. (App. D.) The opinion was less than a page long and did not address the issues relating to the default judgment.

REASONS FOR GRANTING THE WRIT

I. BY AFFIRMING THE DEFAULT JUDGMENT IN THE PRESENT CASE, IN WHICH THERE WERE NEVER ANY SPECIFIC FACTUAL FINDINGS MADE WITH RESPECT TO SEVERAL OF THE FACTORS ON WHICH THE DISTRICT COURT PURPORTEDLY RELIED UPON IN ENTERING THE DEFAULT JUDGMENT, THE ELEVENTH CIRCUIT ENTERED A JUDGMENT IN CONFLICT WITH THE THIRD CIRCUIT RULE THAT A COURT MUST MAKE SPECIFIC FACTUAL FINDINGS WITH RESPECT TO THE FACTORS ON WHICH IT RELIES IN ENTERING A DEFAULT JUDGMENT.

This case is on appeal from the denial of Bronner Bros.' Motion to Set Aside an Entry of Default under Fed. R. Civ. P. 55(c) and the corresponding grant of Blount's Motion for Entry of Default judgment.[4] A writ of certiorari is requested to enable this Court to clarify the circumstances under which a district court may deny a Rule 55(c) or Rule 60(b) motion and correspondingly enter a default judgment.

A. Rule 55(c) And Existing Jurisprudence Do Not Provide Sufficient Guidance As To Whether A District Court Must Make Specific Findings In The Course Of Determining Whether "Good Cause" Sufficient To Set Aside Entry Of Default Has Been Shown.

Under Rule 55(c) of the Federal Rules of Civil Procedure, the district court may set aside a prior entry of

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4. In most cases, and for purposes of this certiorari petition, opposition to a motion for entry of a default judgment may be equated with a motion to set aside a default. *See* Wright, Miller & Kane, *Federal Practice and Procedure* § 2692 (3d ed. 1998).

default "[f]or good cause shown." Fed. R. Civ. P. 55(c). It is well established that action on a motion to set aside entry of default is within the sound discretion of the district court. *See Robinson v. United States*, 734 F.2d 735, 739 (11th Cir. 1984). The district court has greater freedom to grant relief from a default than it has to grant relief from a default judgment. *See* Wright, Miller & Kane, *Federal Practice and Procedure*, § 2692 (3d ed 1998) [hereinafter Wright, Miller & Kane]; *Equal Employment Opportunity Comm'n v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990) ("good cause" standard for setting aside entry of *default* under Rule 55(c) is less rigorous than the "excusable neglect" standard applicable to motions to set aside a default *judgment* under Rule 60(b)). As a general matter of policy, opening a default and proceeding on the merits is preferable to a default judgment. The various circuits of the U.S. Court of Appeals agree that decisions on the merits are preferred while default judgments are disfavored. *See, e.g., Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998); *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995); *Florida Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993); *Taylor v. City of Ballwin*, 859 F.2d 1330, 1332 (8th Cir. 1988); *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 420 (3d Cir. 1987); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987); Wright, Miller & Kane, *supra*, § 2693. What is not as well established, however, are the requirements that a district court must satisfy before taking the disfavored action of denying a Rule 55(c) motion and entering a default judgment based on a defendant's failure to answer in a timely fashion. Beyond requiring "good cause," Rule 55(c) provides no guidance concerning when a district court may do so. Given the potentially devastating consequences of a default judgment, a better defined standard is necessary in this area.

Several Circuits have established multi-factor tests to determine whether the entry of a default judgment is

appropriate in the given case. *See, e.g., Securities Exch. Comm'n. v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1384-85 (9th Cir. 1996); *Florida Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993); *Smith v. Commissioner*, 926 F.2d 1470, 1479 (6th Cir. 1991); *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987). However, only the Third Circuit has addressed the issue of whether, and to what extent, a court must make specific factual findings with respect to the factors it has embraced before denying a Rule 55(c) motion or Rule 60(b) motion. It is this question, and not the specific factors chosen by the district court, that is at issue.[5] Counsel has been unable to discover any decision of this Court stating the pertinent circumstances, or the applicable procedures, governing a district court's decision whether to deny a Rule 55(c) motion.[6] The time has come for guidance in this area.

B. The Third Circuit Approach Of Requiring A District Court To Make Specific Factual Findings In Connection With Deciding A Rule 55(c) Motion Best Serves The Purpose Of The Rule.

The Third Circuit requires district courts to make specific findings of fact prior to employing the ultimate sanction of

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5. Bronner Bros. does not challenge the factors purportedly applied by the courts below to measure "good cause." Rather, Bronner Bros. finds contrary to law and justice the failure of the courts below to explain through specific findings of fact how those factors lead to the conclusion that Bronner Bros. failed to establish good cause under Rule 55(c).

6. The Court took up a similar question in the extremely specialized context of a motion to set aside a default judgment stripping a naturalized citizen of his citizenship. *Klapprot v. United States*, 335 U.S. 601 (3d Cir. 1949). However the focus of that case was on the effect of the petitioner's failure to move to set aside default until several years after it was entered. The Opinion is not instructive in this case.

default. *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987). In *Emcasco*, the Third Circuit explained that explicit findings of fact are essential to the proper exercise of discretion in upholding a default judgment.

> This court has time and again reiterated that "in exercising our appellate function to determine whether the trial court has abused its discretion in dismissing, or refusing to lift a default, we will be guided by the manner in which the trial court balanced [certain enumerated] factors." The applicable factors that the district court must consider are: (1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a *prima facie* meritorious defense; (3) whether the defaulting defendant's conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions.
>
> In order that we may properly exercise our function of reviewing for abuse of discretion, we have further required the district court to make explicit findings concerning the factors it must consider in rendering judgment by default or dismissal, or in declining to reopen such judgment.

Id. at 73-74 (brackets and emphasis in original) (cites omitted).

The Third Circuit held that the district court erred in not making the required findings. "It is patently clear that the district court did not pursue the analysis mandated by our precedent. For example, there was no consideration given to whether [the defendant's] proffered answer raised a potentially meritorious defense." *Id.* at 74. The court

continued: "Another relevant factor which the district court did not address was whether [the Plaintiff] would be prejudiced if the default judgment were vacated." *Id.* The court noted that the district court considered only one factor, the defendant's culpability in not timely answering the complaint. *Id.* at 75. The court concluded that the district court abused its discretion in refusing to set aside entry of default.

By requiring district courts to make specific factual findings in connection with a Rule 55(c) motion, the Third Circuit approach ensures (1) that those courts will thoroughly explore the issue of whether good cause exists to set aside default in the first instance and (2) that appellate courts will have sufficient facts and information upon which to determine whether a district court has properly exercised its discretion under Rule 55(c). Without such a requirement, appellate review of denial of a Rule 55(c) motion is a practical impossibility.

C. The Eleventh Circuit's Approach In The Present Case Is In Conflict With The Reasoned Approach Of The Third Circuit And Effectively Denies Petitioner Adequate Appellate Review Of The District Court's Denial Of Petitioner's Rule 55(c) Motion Below.

The district court actions affirmed by the Eleventh Circuit in this case bear a strong resemblance to the district court opinion overturned by the Third Circuit in *Emcasco*. The Magistrate below identified four factors as pertinent in deciding whether to enter a default judgment: (1) whether the party in default has a meritorious defense; (2) whether the defaulting party has acted promptly upon learning of his default; (3) whether the default was the result of excusable neglect as opposed to willfulness; and (4) whether there

would be any possible prejudice to the non-defaulting party should the motion be allowed.[7]

Bronner Bros. made at least a *prima facie* showing concerning all these prongs. Bronner Bros. presented the Affidavit of Bernard Bronner which denied Respondent's allegations to establish a meritorious defense. This Affidavit was not contested, other than by the allegations of the Complaint itself. To establish excusable neglect and the reason Bronner Bros. did not realize its default earlier, the Company submitted the detailed Affidavit of Ms. Binder. This Affidavit included, among other things, the identity of the employee in the Clerk's Office with whom Ms. Binder communicated about the case. This Affidavit also was not contested.

Despite the *prima facie* showing of "good cause" by Bronner Bros., the Magistrate's July 22 Recommendation — like the opinion of the reversed district court in *Emcasco* — did not address Bronner Bros.' submission and contained findings only with respect to one of the four factors identified by the court as relevant: failure to act promptly. The July 22 Recommendation did not even address whether Bronner Bros. had stated a *prima facie* meritorious defense in Bernard Bronner's uncontested Affidavit. Indeed, the July 22 Recommendation did not even acknowledge the Affidavit's existence. Similarly, the July 22 Recommendation did not address the "prejudice" factor in any way, despite the fact that courts generally find that prejudice does not arise solely from a delay[8] and despite the fact that a finding of prejudice

7. Again, Bronner Bros. does not quarrel with the Court's chosen factors. Bronner Bros. contention is based on the failure to make specific findings explaining how those factors add up to a lack of good cause under Rule 55(c).

8. The mere delay in proceedings caused by the default typically does not constitute prejudice in and of itself. Something (Cont'd)

is the most persuasive reason to deny a Rule 55(c) motion and grant a default judgment. Wright, Miller & Kane, *supra*, § 2699.

The district court's opinion adopting the July 22 Recommendation did not rectify the Magistrate's errors. Instead, it compounded them. The district court identified the same four applicable factors as the Magistrate as the basis for considering a Rule 55(c) Motion to open a default. Unlike the Magistrate, the district court at least mentioned three of the four cited factors in its opinion. Unfortunately, as in the *Emcasco* case, the district court in this case failed to discuss the basis of its findings. The entire extent of the court's discussion of the factors is limited to the following:

> After a *de novo* review of the record, the Court concludes that the R&R [Report and Recommendation] is correct and defendant's objections lack merit. The Magistrate Judge properly considered the particular facts of this case. He considered not only defendant's lack of promptness, but also the general lack of good cause. Furthermore, the Court believes that the

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(Cont'd)
more is required, for example, a showing that Plaintiff's ability to pursue the claim has been hindered by the loss of evidence or otherwise. *See Thompson v. American Home Assurance Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996); *Gross v. Stereo Component Sys., Inc.*, 700 F.2d 120, 123 (3d Cir. 1983). "The issue is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion." *See Federal Deposit Ins. Corp. v. Francisco Inv. Corp.*, 873 F.2d 474, 479 (1st Cir. 1989) (citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2699 (2d ed. 1983)); *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir. 1990). The fact that plaintiff would have to try the case on the merits, or that plaintiff's possible recovery would be delayed, does not justify precluding reopening the case. Wright, Miller & Kane § 2699.

> Magistrate Judge recognized the broad scope of the court's discretion and that he properly cited the two Eleventh Circuit decisions to set forth the guiding principles for consideration of a motion to set aside an entry of default. Finally, the Court finds that defendant's failure to act was willful and that plaintiff will be prejudiced by setting aside entry of default.

(Opinion, at 3-4).

This passage mentions three factors, but does not discuss (let alone make factual findings) with respect to these factors. With respect to the fourth factor, existence of a possible meritorious defense, the district court made no conclusions or factual findings, and it failed to acknowledge or consider Bernard Bronner's Affidavit, which set forth a meritorious defense for Bronner Bros.

The district court also went a step further than the Magistrate by finding that Bronner Bros. acted *willfully*. The district court did not set forth *any* factual findings supporting this conclusion, nor is the finding supported by the July 22 Recommendation, which does not characterize the default as "willful." This is a key finding because of the disfavored status of non-willful defaults in the legal system. Even a negligent and inexcusably tardy defendant should receive relief from default where the default was not willful. *See, e.g., Bicicletas Windsor, S.A. v. Bicycle Corp. of America*, 783 F. Supp. 781, 788 (S.D.N.Y. 1992) (condemning defendant as "inattentive and negligent" but finding relief from default judgment appropriate because in "deciding whether to hold a defendant in default, however, the standard the court must apply is not carelessness but willfulness"). The district court, by using the word "willful" in its opinion, acknowledged this principle. However, by failing to support

its finding of willfulness, it ignored the spirit behind the principle.

Indeed, if the district court *had* undertaken to make factual findings with respect to willfulness, it would have been compelled to give the benefit of any doubt to Bronner Bros., because the only evidence concerning this issue was the Affidavit of Camille Binder, an executive assistant for Bronner Bros.[9] As set forth in the statement of facts above, Binder averred that Bronner Bros.' failure to file anything after its November 1995 motion for extension of time to answer resulted from two serious but honest mistakes: (1) the belief that Bronner Bros. had filed an effective Answer within the time requested in Bronner Bros.' Motion for Extension of Time to Answer; and (2) the fact that Binder's telephone calls to Ms. Rivera in the Clerk's Office left her with the impression that Bronner Bros.' putative Answer — and thus its basis for avoiding default — was already before the court.

Thus, by essentially incorporating the Magistrate's July 22 Recommendation, the district court also incorporated factual findings with respect to only a single factor — failure to act promptly. Bronner Bros. raised this point on appeal, claiming that the district court abused its discretion in denying its Rule 55(c) motion because the district court's conclusions with respect to three of the four factors were unexplained (and, in fact, unexplainable) in light of the facts. However, the Eleventh Circuit affirmed, finding no abuse of discretion in spite of the lack of explanation.

This decision below is in conflict with the approach of the Third Circuit, which requires factual findings with respect

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9. Doubts should be resolved in favor of the party moving to set aside the entry of default. *See Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983); Wright, Miller & Kane, *supra*, § 2681.

to all factors comprising the district court's test. Had the Eleventh Circuit applied the Third Circuit rule, it would have found the district court's denial of Bronner Bros.' Rule 55(c) motion an abuse of discretion and reversed. Indeed, this result under the Third Circuit approach is even clearer in the present case than it was under *Emcasco*. *Emcasco* involved defendant's Rule 60(b) Motion to Set Aside a Default Judgment, while Bronner Bros. moved under Rule 55(c) to set aside a mere *default* — when relief is more readily granted to defendants. *See* Wright, Miller & Kane, *supra*, § 2692 (3d ed 1998); *Equal Employment Opportunity Comm'n v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990) ("good cause" standard for setting aside entry of *default* under Rule 55(c) is less rigorous than the "excusable neglect" standard applicable to motions to set aside a default *judgment* under Rule 60(b)). By not following the Third Circuit approach, the court below denied Petitioner effective appellate review of the district court's erroneous conclusions.

D. A Writ of Certiorari is Justified to Resolve These Questions

This Court should grant a writ of certiorari to resolve this conflict, for two reasons. First, undersigned counsel's research has revealed no cases in which this court has squarely addressed the circumstances governing Rule 55(c) motions or otherwise clarified the prerequisites to a district court's entry of a default judgment as a sanction for failure to answer a complaint on time. Guidance on these issues, therefore, seems overdue.

Second, in order to promote established policy disfavoring default judgments in favor of decisions on the merits, this Court should eliminate the Eleventh Circuit's approach in favor of the Third Circuit's. As noted above, it is widely established that default judgments are disfavored

and that "all doubts should be resolved in favor of those seeking relief under Rule 55(c) and 60(b)." *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983)).[10] Adoption of the Third Circuit's rule would vindicate these principles. Since default judgments are disfavored, courts should be required to explain, with specific factual findings, why a particular case requires deviation from the presumption that a default judgment should not be entered. This simple procedural safeguard against unwarranted, disfavored default judgments is all that is entailed by the Third Circuit rule. It also enhances the appearance that courts are doing justice rather than merely applying procedural rules. Procedure is important to the administration of the legal system, but it cannot be permitted to trump justice.

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10. This case presents a good illustration of why default judgments are disfavored. As in this case, a district court's entry of default judgment can have profound and devastating effects on a defendant's ability to defend itself. In cases like the instant case, the sanction of a default judgment is disproportionate to the "wrong." This is especially true in cases like the instant case where the complaint contains allegations of sexual harassment or misconduct — allegations which, if taken as true, and presented as such to a jury — are virtually impossible to explain to a jury for purposes of limiting damages to a reasonable figure.

II. BY AFFIRMING THE DEFAULT JUDGMENT IN THE PRESENT CASE, IN WHICH THERE WAS NEVER ANY CONSIDERATION GIVEN TO THE POSSIBILITY OF LESSER SANCTIONS, THE ELEVENTH CIRCUIT ENTERED A JUDGMENT IN CONFLICT WITH THE THIRD CIRCUIT RULE THAT LESSER SANCTIONS MUST BE CONSIDERED BEFORE A DEFAULT JUDGMENT CAN BE ENTERED.

A. The Circuits Disagree As To The Extent Of A District Court's Obligation First To Impose Or At Least Try Lesser Sanctions Before Imposing A Default Judgment.

Courts agree that the entry of a default judgment is a drastic remedy which should be used only in extreme situations, as the court has available to it a wide range of lesser sanctions. *See, e.g., Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985); *Canfield v. VSH Restaurant Corp.*, 162 F.R.D. 431, 434 (N.D.N.Y. 1995); *Katz v. Morgenthau*, 709 F. Supp. 1219, 1225-26 (S.D.N.Y. 1989). The question arises most commonly when district courts strike an answer pursuant to Rule 37, but at least two circuits have also required consideration of lesser sanctions where a defendant failed to answer in a timely fashion. *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982); *Anilina Fabriques de Colorants v. Aakash Chemicals*, 856 F.2d 873 (7th Cir. 1988). *See also In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 398, 418-19 (E.D. Pa. 1981) (entry of default set aside, conditioned on defendant's payment of plaintiff's costs and attorney's fees incurred in moving for default judgment); *James Elec. Co. v. Cougar Enterprises., Inc.*, 111 F.R.D. 324, 326 (D.D.C. 1986) (entry of default set aside where prejudice to plaintiff could be ameliorated by defendant's payment of plaintiff's costs incurred in obtaining default).

In *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982), the Fourth Circuit indicated that under certain circumstances, a district court must first consider lesser sanctions. In *Moradi*, the Clerk's Office returned a defendant's answer because the defendant's attorney was not admitted to practice in the jurisdiction. *Id.* at 727. A letter from the Clerk's Office was sent apprising the attorney of the rejection of the answer. *Id.* Then, on February 17, 1981, counsel for plaintiff, the United States, sent a letter to the attorney's office notifying the attorney that no answer had been filed. *Id.* The attorney's staff, however, apprised the attorney of neither letter, and so the attorney did not learn of the default until March 20, 1981, after a default judgment was entered.[11] *Id.* The district court rejected defendant's Rule 60(b) motion to set aside the default judgment. On appeal, the Fourth Circuit reversed, stating, "It is beyond cavil that there was no delay here once the default was discovered . . . In the circumstances, we believe that since the district court is permitted to impose less severe sanctions, it was not justified in refusing all relief." *Id.* at 728.

The Seventh Circuit also has indicated that, at least under certain circumstances, the district court must consider lesser sanctions. In *Anilina Fabriques de Colorants v. Aakash Chemicals*, 856 F.2d 873 (7th Cir. 1988), a default judgment was entered primarily based on defendant's failure to file an answer. The Seventh Circuit reversed. It noted that the district court did not attempt or even consider a lesser sanction, *id.* at 878, and held, "[W]e believe that the judge did abuse her discretion here by entering the default judgment in the absence of any bad faith or willfulness without first

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11. The situations of Bronner Bros. and this attorney are therefore identical in that each had an incorrect understanding of the effectiveness of their answer, notwithstanding that notices had been sent to each which would have corrected the misunderstanding had their respective staffs correctly handled those notices.

employing any lesser sanctions." *Id.* at 877. This case therefore arguably indicates that a district court must first try lesser sanctions before imposing a default judgment for failure to answer, when that failure was not willful or in bad faith.

Similarly, the Third Circuit has held that in *every* case, the district court must consider — though not necessarily try — alternative sanctions less severe than a default judgment. *See Emcasco*, 834 F.2d at 73. Moreover, the district court must make specific factual findings concerning the effectiveness of alternative sanctions. *Id.* at 74.

B. In Contrast To The Third Circuit Rule That Alternative Sanctions Must Be Considered Before A Default Judgment Imposed, The Eleventh Circuit In This Case Held That The District Court, Which Ignored Bronner Bros.' Pleas To Consider Alternative Sanctions, Did Not Abuse Its Discretion.

In its Objection to the Magistrate's July 22 Recommendation, filed with the district court, Bronner Bros. argued that to the extent that Bronner Bros. was sufficiently at fault to warrant sanctions, it should be sanctioned less severely than with a default judgment. Bronner Bros. pointed out that the district court could choose from a wide array of lesser sanctions, and urged the district court to consider imposing a lesser sanction. The district court's order adopting the Magistrate's July 22 Recommendation and denying Bronner Bros.' Rule 55(c) motion did not even mention the possibility of lesser sanctions, let alone consider them or explain why a default judgment should be imposed instead of a lesser sanction.

On appeal, Bronner Bros. argued that the district court abused its discretion by, among other things, entering default

judgment without considering a lesser sanction. The Eleventh Circuit failed to address this argument specifically. It did, however, find that the district court did not abuse its discretion in entering default judgment. The Eleventh Circuit, therefore, tacitly rejected the view that a district court must consider lesser sanctions before imposing a default judgment as a sanction for failure to timely answer Petitioner's complaint. This decision is directly in conflict with the Third Circuit case law set forth above.

C. A Writ of Certiorari is Warranted to Resolve This Conflict.

This Court should grant a writ of certiorari to resolve this conflict, for two reasons. First, as noted above, undersigned counsel's research has revealed no cases in which this Court has squarely addressed the prerequisites to a district court's entry of a default judgment as a sanction for failure to answer a complaint on time. It is time for this Court's guidance on this issue.

Second, in order to promote established policy disfavoring default judgments in favor of decisions on the merits, this Court should eliminate the Eleventh Circuit's approach in favor of the Third Circuit's. As noted above, it is widely established that default judgments are disfavored and that "all doubts should be resolved in favor of those seeking relief under Rule 55(c) and 60(b)." *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983)). Adoption of the Third Circuit's rule would vindicate these principles. Since default judgments are disfavored, courts should be required to consider foregoing them in favor of lesser sanctions. Such consideration would be a simple, and yet effective, safeguard against the disfavored device of default judgments and would preserve the integrity of the system (such lesser sanctions must be "effective") while simultaneously preserving the

interest of justice. Under the all or nothing standard endorsed by the Eleventh Circuit, justice almost always will suffer.

CONCLUSION

Wherefore, Petitioner prays that this Court grant its petition for writ of certiorari, order full briefs and oral arguments, and reverse the Judgment of the District Court and the Affirmation of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 14, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8950
Non-Argument Calendar

D. C. Docket No. 95-01877-1-CV-MHS

TERI M. BLOUNT,

Plaintiff-Appellee,
Cross-Appellant,

versus

BRONNER BROS., INC.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(October 14, 1999)

Before TJOFLAT and HULL, Circuit Judges, and GODBOLD, Senior Circuit Judge.

Appendix A

PER CURIAM:

This case arises under Title VII of the Civil Rights Act and Georgia State Tort Claims Law. Plaintiff sued for sexual harassment and for retaliation. A default judgment was entered against defendant. A jury returned a verdict for compensatory and punitive damages. The trial judge awarded damages for back pay, fringe benefits, attorney fees and costs, and post-judgment interest.

This is the relevant series of events:

July 26, 1995: Suit filed.

July 29: Request for waiver of service mailed to defendant.

October 11: Defendant refused waiver of service.

October 25: Service perfected on defendant.

November 14: Defendant filed motion to extend time to answer through November 27. No answer filed.

January 19, 1996: Request by plaintiff for entry of a default.

February 5: Default entered.

February 6: Motion by plaintiff for judgment by default as to liability.

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February 29: Magistrate ordered entry of default.

May 6: Report and recommendation by magistrate that default judgment be entered.

May 22: Counsel for defendant first appeared. This was ten months after defendant received a copy of the complaint through the mail and refused to waive service; seven months after personal service; six months after defendant requested extension of time to answer; four months after plaintiff requested a default; three months after default was entered and plaintiff moved for entry of judgment by default.

Defendant moved to set aside default and objected to the magistrate's report and recommendation.

_____: District Judge ordered new report and recommendation in light of defendant's motion.

July 22, 1996: Magistrate recommended that motion to set aside default be denied and judgment by default entered. Defendant objected.

September 18: District judge held that default judgment was appropriate and adopted the recommendation of the magistrate refusing to set aside default.

June 26-27, 1997: Trial on compensatory and punitive damages only. Jury awarded $75,000 compensatory damages and $200,000 punitive damages. Later the judge entered an order awarding attorney fees of $42,868, $9,000 plus for back pay, and fringe benefits of $2,578.05.

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November 4, 1997: Judgment entered for compensatory and punitive damages, back pay, fringe benefits, attorneys' fees and costs together with post-judgment interest.

June 25: Defendant's post-trial motions denied.

Defendant's contention that the district court abused its discretion by entering a default judgment is frivolous. The court did not err in denying defendant's motion to set aside the default.

The evidence adequately established the award of punitive damages. The person who committed the acts of sexual harassment was the chairman, president, chief operating officer and chief executive officer of the defendant. Defendant acknowledged that there had been sexual harassment, a wrongful, retaliatory discharge of plaintiff and that the company had knowledge of the harassment and retaliatory discharge. There was no evidence that the defendant made good faith efforts to comply with Title VII.

Plaintiff cross-appealed from the award of attorneys' fees. The court found that the market hourly rate in the Northern District of Georgia was $240 per hour for a person with the skill and experience of lead counsel Irvin and $185 per hour for counsel Kaye. The judge reduced these figures to $200 per hour for Irvin and $140 per hour for Kaye. Her basis was that the professional undertaking by counsel was less onerous because the case was a default case, and the difficulty of the case was reduced and the skill necessarily required for success was lessened by the default. Plaintiff concedes that the default judgment relieved counsel for

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Blount from responsibility for various tasks: depositions and discovery, summary judgment proceedings, briefing, and trial preparation and time. The court recognized that the default judgment was comparatively less onerous and involved less effort and study, pressure, worry, mental strain, and the like. The district court did not abuse her discretion in reducing the hourly rates for counsel.[1]

Judgments on the appeal and cross-appeal are AFFIRMED.

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1. Plaintiff does not question a minor adjustment in attorney time and she has abandoned her claim for back pay.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED SEPTEMBER 16, 1996 AND FILED SEPTEMBER 18, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
1:95-cv-1877-MHS

TERI M. BLOUNT,

Plaintiff,

v.

BRONNER BROS., INC.,

Defendant.

ORDER

Presently before the Court are the Magistrate Judge's Report and Recommendation ("R&R") and defendant's objections to the R&R. The Magistrate Judge recommends that the Court deny defendant's motion to set aside entry of default and that judgment be entered in this action in favor of plaintiff. Defendant objects to the R&R on the grounds that the Magistrate Judge erred by failing to address relevant factors other than whether defendant acted promptly, failing to properly grasp the broad scope of the district court's

discretion to set aside an entry of default, and improperly relying on two Eleventh Circuit cases that are factually dissimilar to this case.

Rule 55(a) of the Federal Rules of Civil Procedure permits the Clerk to enter default against a party if the party has failed to plead or defend a lawsuit. Fed. R. Civ. P. 55(a). However, a court may set aside the entry of default for good cause shown. Fed. R. Civ. P. 55(c). Since entry of default, as opposed to actual judgment, is interlocutory and technical in nature, the "good cause" standard used by courts to set aside entry of default is less rigorous than the "excusable neglect" standard used to set aside a default judgment. *EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990). The issue of whether to reopen an entry of default is left to the trial court's discretion and entails consideration of the promptness with which the defaulting party acted, whether the default is due to neglect as opposed to willfulness, whether an alleged defense would be meritorious, and whether set-aside would prejudice the plaintiff. *Rasmussen v. W.E. Hutton & Co.*, 68 F.R.D. 231, 233 (N.D. Ga. 1975). It is well-established that entry of judgment by default is a drastic remedy and should be considered only in extreme situations. *E.F. Hutton & Co., Inc. v. Moffatt*, 460 F.2d 284, 285 (11th Cir. 1972).

After a *de novo* review of the record, the Court concludes that the R&R is correct and defendant's objections lack merit. The Magistrate Judge properly considered the particular facts of this case. He considered not only defendant's lack of promptness, but also the general lack of good cause. Furthermore, the Court believes that the Magistrate Judge

recognized the broad scope of the court's discretion and that he properly cited the two Eleventh Circuit decisions to set forth the guiding principles for consideration of a motion to set aside an entry of default. Finally, the Court finds that defendant's failure to act was willful and that plaintiff will be prejudiced by setting aside the entry of default.

Therefore, the Court ADOPTS the Magistrate Judge's R&R [#17-1]; DENIES defendant's motion to set aside default [#11-1]; GRANTS plaintiff's motion for judgment by default [#7-1]; and DIRECTS that judgment as to liability be entered in favor of plaintiff.

IT IS SO ORDERED, this 16th day of September, 1996.

s/ Marvin H. Shoob
Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia

APPENDIX C — ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED JULY 19, 1996 AND FILED JULY 22, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:95-CV-1877-MHS

TERI M. BLOUNT,

Plaintiff,

v.

BRONNER BROS., INC.,

Defendant.

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rules 260 and 500. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Appendix C

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 19 day of July, 1996.

s/ John R. Strother, Jr.
UNITED STATES MAGISTRATE JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:95-CV-1877-MHS

TERI M. BLOUNT,

Plaintiff,

v.

BRONNER BROS., INC.,

Defendant.

REPORT AND RECOMMENDATION

The plaintiff filed this action alleging sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., as amended by Title VII of the Civil Rights Act of 1991, 42 U.S.C. 1981a. She also alleged various state law claims. This action is currently before the undersigned on the defendant's Motion to Set Aside Entry of Default. [11]. The plaintiff has filed a response and the action is ripe for review.

The plaintiff filed this action on July 26, 1995, almost one year ago. [Dkt. Ent. 1]. The action was served via the mail, as authorized under Fed. R. Civ. P. 4. The defendant refused service by mail and personal service was made on

the defendant on October 25, 1995. [Dkt. Ents. 4, 5; Aff. of McArthur Irvin].[1] On November 13, 1995, Charles Bronner, the Finance Officer of Bronner Brothers Inc., filed a *pro se* request for additional time to November 27, 1995, to file an answer to the complaint. He sought additional time in order to hire counsel and because the company president, Bernard Bronner, was out of the country. [3]. On January 19, 1996, the plaintiff moved for entry of default. [4] On February 6, 1996, the plaintiff moved for default by the court. [7]. On February 29, 1996, the undersigned issued an order finding the motion by Bronner Brothers for an extension of time to answer Moot and directing the entry of default and to give proper notice to the defendant of entry of default. [Dkt. Ent. 8]. Default was then entered and notice given to the defendant. Both the motion of January 19, 1996, and that of February 6, 1996, were served on the defendant and no responses were filed.

On April 3, 1996, the plaintiff moved for entry of default judgment. [9]. This was also served on the defendant. No response was filed. On May 3, 1996, the undersigned recommended that the motion be granted. The defendant then filed an objection to the Report and Recommendation and filed this motion to set aside the default. As part of the response, the defendant offers the affidavit of Camille Binder. She states that she filed the motion for extension of time with the court on November 24, 1995, and believes that on approximately November 27, 1995, she filed a *pro se* answer

1. The undersigned notes that pursuant to Fed. R. Civ. P. 4(d)(2)(G), a defendant who refuses to recognize service by mail and waive personal service is to be assessed costs unless good cause is shown for the failure to do so.

with the court. She states that she delivered the original but not a copy to the clerk. She further states that she did not keep a copy of the answer, but has a copy on her computer. The undersigned has reviewed all of the documents in the records in this court, including the original and duplicate files and the correspondence files for this case. No such document has been located, nor is there any indication of such a document on any docket. Ms Binder also states that since November, 1995, she has called and checked on the status of the case approximately five times. She states that Bronner Brothers did not know what was happening with the case until it received a copy of the February 5, 1996, motion for default. They then received the undersigned's Report and Recommendation on May 12, 1996. They filed no response to the February, 1996, motion.

Under Fed. R. Civ. P. 55(c):

> For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Because no judgment has been entered, the standard to be applied in this case is the less rigorous one of good cause under Rule 55(c). *See, EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524 (11th Cir. 1990); *Jones v. Harrell*, 858 F.2d 667 (11th Cir. 1988).

The determination of whether good cause exists is dependent upon the court's discretion "with proper regard to the peculiar circumstances surrounding the case before

it." *Rasmussen v. W. E. Hutton & Co.*, 68 F.R.D. 221, 233 (N.D.Ga. 1975). Judgments by default are not favored, thus, "as a general proposition, any doubts should be resolved in favor of permitting a hearing on the merits." *Id.* Several factors can be considered in deciding whether good cause exists to remove a defendant from default, such as the merits of the defense; the promptness with which the defaulting party acted; whether the default is due to excusable neglect as opposed to willfulness; and the possible prejudice to the non-defaulting party. *Id.* Action upon a motion to set aside a default is within the discretion of the district court. *Robinson v. United States*, 734 F.2d 735 (11th Cir. 1984). In *EEOC v. Mike Smith Pontiac GMC, Inc.*, the court refused to overturn the grant of a default judgment, though noting that the district court had improperly applied the more rigorous standard of excusable neglect. *Id.* at 526-27. The court found that the defendant could not meet the standard. The court noted that the defendant's registered agent had moved, thus making service by mail impossible. The plaintiff had then resorted to personal service as well as service by mail on the managing agent. No response was ever received and it was not until a month after entry of default that the defendant filed a notice of appearance. *Id.* at 528-29. The court found that the defendant had revealed no meaningful justification for engaging in the dilatory conduct which caused the default to be entered. *Id.* Finally, the court noted that the defendant waited until almost four months after the entry of default to move to set aside the default. *Id.*

In *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000 (5th Cir. 1970), the action had originally be filed in June, 1968 and default was entered. This default was vacated in

December, 1968, due to a technical failure in service on the defendant. In January, 1969, the corporation filed an answer in the form of a letter from the president denying all allegations in the complaint. Three months later a pre-trial conference was scheduled and the defendant did not appear. Default was entered on March 26, 1969, because of no representative appeared and because the letter from the president did not constitute an answer. On April 7, 1969, the defendant, through an attorney, filed a timely motion to set aside the default, which was denied in November, 1989. This was denied and the denial affirmed on appeal. *McGrady*, 434 F.2d at 1000. The court found that the record evidenced sufficient delay and failure to abide by court rules to justify the entry of default. *Id.* at 1000-01. The court refused to determine whether the letter was a sufficient answer, based on the defendant's failure to appear at the pretrial conference. *Id.*

The undersigned finds that the answer filed by Bronner Bros., Inc. *pro se* was not adequate. It has long been the rule in this circuit that a corporation is an artificial entity that can act only through agents and cannot appear in judicial cases *pro se*. *See*, *National Independent Theater Distributors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 02 (11th Cir. 1984) *cert. denied*, 471 U.S. 1056 (1985); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1384 (11th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *In re K.M.A., Inc.*, 652 F.2d 398 (5th Cir. 1981). While the defendant argues that it did not realize that it could not file a *pro se* answer, the undersigned finds that this argument, in light of the facts in this case, is unavailing. Furthermore, even if the defendant is given the benefit of such an argument, the undersigned further finds that it has failed to timely act in this case.

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The defendant knew of this action when first served by mail in October, 1995. It refused service and was then served personally. A motion filed in November, 1995, sought time to answer in part, **so that counsel could be hired.** The corporation then, if the affidavit of Ms. Binder is taken as true, tried to file a *pro se* answer at some time in November, 1995. There is no record of this in the files of this court and the fact that the defendant has a copy on a computer is of little help. Thus, the defendant clearly knew that counsel was needed and stated it was seeking counsel eight months ago. The defendant has been served by the plaintiff with her motions. Furthermore, the defendant acknowledges that it received the motion for entry of default in early February of this year. The defendant took no action despite receipt of this motion. No counsel filed an appearance and no objection or response was ever filed as to this motion. The defendant did not file anything in this court until May, after receipt of the undersigned's Report and Recommendation. This was long after entry of default and almost one year after the law suit was filed. The defendant has not attempted in any manner to defend this action in a timely or reasonable manner. Even if Ms. Binder did contact the clerk's office concerning the action, this does not excuse the defendant from obtaining counsel — as it indicated it was seeking to do in November, 1995 — and defending this action in a timely manner. Waiting until ten months after the action was filed, nine months after service, and three months after entry of default to make a proper appearance in this court, fails even under the lesser standard of good cause. Therefore, the undersigned must RECOMMEND that the Motion to Set Aside Default be DENIED and that judgment be entered in this action in favor of the plaintiff.

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IT IS SO RECOMMENDED this 19 day of July, 1996.

s/ John R. Strother, Jr.
JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE
JUDGE

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 14, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8950-AA

TERI M. BLOUNT,

Plaintiff-Appellee,
Cross-Appellant,

versus

BRONNER BROS., INC.,

Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: TJOFLAT and HULL, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing/rehearing en banc of the defendant-employer asserts that decision of this case is controlled by *Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999). *Kolstad* is not controlling. Bronner, a

managerial agent of the defendant/employer was not shown to be acting contrary to good faith efforts of the company to comply with Title VII. There was no evidence that any such good faith efforts were ever made by the defendant/employer. The petition for rehearing is DENIED. The petition for rehearing en banc is DENIED and no member of this court nor other judge in regular active service having been requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; the Eleventh Circuit Rule 35-5), the suggestion of rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
SENIOR CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 11 2000
CLERK

No. 99-1638

IN THE

Supreme Court of the United States

BRONNER BROS., INC.,

Petitioner,

v.

TERI M. BLOUNT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's Statement of the Case ("Statement") is deficient from three standpoints. First, the Statement includes a section irrelevant to the Questions Presented. Second, the Statement includes one section based on no facts of record that seems to be Petitioner's attempt to evoke sympathy for its failure to answer a lawsuit. Third, the Statement is, at best, not entirely accurate and, at worst, contains a significant misrepresentation.

A. Petitioner's Statement Contains Irrelevant And Non-Fact Based Sections

Considering that the Questions Presented concern the propriety of the entry of default judgment, section D. of the Statement, "Trial on the Issue of Damages," is improperly included.

Furthermore, Petitioner's one paragraph purported synopsis of the two day trial is neither complete nor accurate. However, because of the lack of relevance of the trial to the propriety of the entry of default judgment, Respondent will not burden the Court with a detailed discussion of the numerous admissions of Bernard Bronner and Bronner Bros. and other testimony at trial.[1]

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1. Respondent would, however, briefly mention that, among other things, Bernard Bronner — the highest management official in Bronner Bros., responsible, in his words, for "everything" regarding the company — admitted that he inappropriately and wrongfully touched Blount. (R.5-124, 130). Bronner also admitted sexually harassing Blount and another employee. (R.5-118-19). Bronner admitted that he discharged Blount on the airplane because of his conversation with her fiance, Woods, and that, if not for the conversation, Blount would not have been terminated. Bronner further admitted that the termination was retaliatory and wrongful. (R.5-34-35, 137).

While section B. of the Statement, "Bronner Bros.' Default," appears relevant, it has no factual basis. Rather, it is an attempt by a 53 year company of 350 employees to evoke sympathy for its failure to do what millions of others confronted with a lawsuit have managed to do: obtain an attorney and effectively file an answer.

B. An Objective Statement Of The Procedural History

Section C. of the Statement, "Procedural History," omits certain facts. Respondent respectfully submits that the Eleventh Circuit's chronology is a more objective statement of the procedural history. It is set forth herein verbatim; Respondent is adding, in footnotes, additional relevant facts:

> July 26, 1995: Suit filed.
>
> July 29: Request for waiver of service mailed to defendant.
>
> October 11: Defendant refused waiver of service.[2]
>
> October 25: Service perfected on defendant.

---

2. Bronner Bros. refusal to waive service of summons, thereby increasing the cost of litigation, was consistent with its position taken prior to the filing of the Complaint. In a letter mailed to Blount's counsel in response to an inquiry about the possibility of resolving the matter without resort to litigation, Bronner Bros. stated that it was "prepared to submit all necessary resources to defend" Bronner Bros. from Blount's claims.

November 14: Defendant filed motion to extend time to answer through November 27.[3] No answer filed.[4]

January 19, 1996: Request by plaintiff for entry of a default.

February 5: Default entered.

February 6: Motion by plaintiff for judgment by default as to liability.

February 29: Magistrate ordered entry of default.[5]

May 6: Report and recommendation by magistrate that default judgment be entered.

---

3. The motion specifically stated that an extension was needed so that Bronner Bros. could "retain counsel and otherwise respond to the complaint" and was served on Blount's counsel.

4. Petitioner has claimed that it attempted to file a *pro se* answer, even though, as noted by the district court, it has long been the rule that corporations cannot appear *pro se*. Notably, the alleged answer was not served on Blount's counsel although Petitioner managed to serve the extension motion. Furthermore, contrary to Petitioner's admission in the Petition for a Writ of Certiorari (at page 3) that it "does not have a copy of" the answer, Petitioner contended throughout the litigation that a copy of the answer was saved on its computer. (R.1-11-Binder Aff. ¶5).

5. The filings of January 19, February 6 and February 29 — stating that Petitioner was in default — were all served on Petitioner; still, Petitioner filed nothing with the court.

May 22: Counsel for defendant first appeared. This was ten months after defendant received a copy of the complaint through the mail and refused to waive service; seven months after personal service; six months after defendant requested extension of time to answer; four months after plaintiff requested a default; three months after default was entered and plaintiff moved for entry of judgment by default.

Defendant moved to set aside default and objected to the magistrate's report and recommendation.

_____: District Judge ordered new report and recommendation in light of defendant's motion.

July 22, 1996: Magistrate recommended that motion to set aside default be denied and judgment by default entered. Defendant objected.

September 18: District judge held that default judgment was appropriate and adopted the recommendation of the magistrate refusing to set aside default.

June 26-27, 1997: Trial on compensatory and punitive damages only. Jury awards $75,000 compensatory damages and 200,000 punitive damages. Later the judge entered an order awarding attorney fees of $42,868, $9,000 plus for back pay, and fringe benefits of $2,578.05.

> November 4, 1997: Judgment entered for compensatory and punitive damages, back pay, fringe benefits, attorneys' fees and costs together with post-judgment interest.
>
> June 25 [1998]: Defendant's post-trial motions denied.

(App. A to Petition for a Writ of Certiorari).

C. The Petition Significantly Misrepresents The Eleventh Circuit's Unpublished Decision

The Petition for a Writ of Certiorari ("Petition") states "[t]he Eleventh Circuit recited a chronology of the case in its brief opinion, but did not explain its reasons for affirming the district court." (Petition at 7). This is a significant misrepresentation because the Eleventh Circuit's *unpublished* decision *does* state the reason for affirming the district court. After reciting the chronology, the Eleventh Circuit stated:

> Defendant's contention that the district court abused its discretion by entering a default judgment is frivolous. The court did not err in denying defendant's motion to set aside the default.

(App. A to Petition).

Petitioner's refusal to acknowledge that the Eleventh Circuit found "*frivolous*" its argument about the entry of the default judgment and to point out that the decision is *unpublished* is characteristic of Petitioner's approach to this

and related litigation. Throughout, Petitioner has asserted unfounded positions in order to delay, further harass Respondent, and avoid the inevitable.[6] Contrary to Petitioner's suggestion, certiorari is not appropriate in a case, such as this, in which the Circuit Court's decision is unpublished and found Petitioner's ultimate argument "frivolous."

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is, of course, an extraordinary circumstance, to occur, as stated in this Court's Rule 10, only where there are "compelling reasons." There is no reason, compelling or otherwise, for this Court to review an unpublished Circuit Court decision that summarily disposed of Petitioner's argument as "frivolous."

The circumstances identified in this Court's Rule 10 as justification for granting a petition for writ of certiorari in no way suggest that the petition in this case should be granted. Because the Eleventh Circuit's unpublished decision summarily disposed of Petitioner's argument concerning the

6. A prime example was the declaratory judgment action brought in the United States District Court for the District of Maryland, Civil Action No. CCB-97-2392, by Bernard Bronner against Respondent (Blount in this case, Woods — her married name — in the Maryland case) subsequent to Respondent's success in the trial on damages. Upon Respondent's motions, that action was dismissed and Rule 11 sanctions awarded against Petitioner's former counsel for the continuation of that action. The court concluded that the declaratory judgment action was continued for "an improper purpose, unfounded in law or fact, that would have allowed Mr. Bronner to harass and punish Ms. Woods for the failure of Mr. Bronner's company to respond on time to Ms. Woods' complaint in the prior litigation." (Court's Memorandum dated July 13, 1998 at page 14).

entry of default judgment as "frivolous," there is not "a United States court of appeals . . . decision in conflict with the decision of another United States court of appeals on the same important question." Rule 10(a). Likewise, because the Eleventh Circuit's unpublished decision summarily disposed of Petitioner's argument concerning the entry of default judgment as "frivolous," "a United States court of appeals has [not] decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c).

Furthermore, the petition should be denied because Petitioner asserts certain arguments which are contrary to the arguments made by Petitioner in the courts below. Additionally, the petition should be denied because, contrary to Petitioner's argument herein, there is no conflict in the circuits concerning the issues raised. Finally, the petition should be denied because this Court has spoken regarding similar issues.

I.

PETITIONER'S ARGUMENT IS CONTRARY TO PETITIONER'S ARGUMENT IN THE COURTS BELOW

The essence of Petitioner's argument is that in determining under Fed. R. Civ. P. 55(c) whether there is "good cause shown" for setting aside an entry of default, courts should be required to make explicit findings of fact regarding specific factors. In support of this position, Petitioner relies exclusively on a 1987 Third Circuit decision, *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987).

However, at no previous time did Petitioner advocate this position or even cite *Emcasco*. In fact, Petitioner, in its reply brief filed in the Eleventh Circuit, vehemently denied that it was advocating the use of specific factors.

Specifically, in Respondent's brief filed in the Eleventh Circuit, Respondent suggested that Petitioner had advocated a position similar to that asserted herein — that a court must consider the factors Petitioner had extensively discussed in its brief. Petitioner responded to that suggestion as follows:

> This claim is outrageous. Bronner Bros. stated explicitly that a court need not find these four factors: "A court is not required to use these four factors; fewer or more factors could be used, as long as the factors used are an appropriate means of identifying circumstances which warrant a finding of 'good cause' to set aside a default." Brief of Appellant, at 17-18.

(Reply Brief at 1-2).

Having lost in the Eleventh Circuit on a more general good cause argument, Petitioner now asserts a position different than that it previously asserted. Such shifting of positions should not be permitted. A party should not be heard to complain about any matter, particularly one of its own making, for the first time in a petition for certiorari to this Court. For this reason alone, the petition should be denied.

II.

BY IGNORING THE LANGUAGE OF THE ELEVENTH CIRCUIT'S DECISION FINDING ITS ARGUMENT "FRIVOLOUS" AND RELYING ON A 1987 THIRD CIRCUIT AND INAPPLICABLE DECISIONS, PETITIONER MISREPRESENTS THE EXISTENCE OF A CONFLICT BETWEEN THE CIRCUITS AND THE LACK OF SUPREME COURT GUIDANCE

A. There Is No Substantive Circuit Court Decision In This Case And, Therefore, No Decision That Conflicts With Any Decision

As indicated herein, the Eleventh Circuit summarily disposed of as "frivolous" Petitioner's argument that the district court abused its discretion by entering default judgment. Therefore, no Circuit Court decision in this case addresses substantively the entry of default. Consequently, there is no merit to Petitioner's suggestion that the unpublished decision in this case — affirming the unpublished lower court decisions denying Petitioner's motion to set aside default — creates a conflict with any decision.

B. Subsequent Decisions Establish That The Third Circuit Reviews Entries Of Default And Dismissals Under The Same Deferential Abuse Of Discretion Standard As Is Used By Other Circuits And Prescribed By This Court

A further problem with Petitioner's argument is that, short of Petitioner's conclusory assertion, there is nothing that suggests a conflict between the Third Circuit and every

other circuit regarding consideration of motions to set aside entry of default. In part, this is attributable to petitioner's reliance on a 1987 decision, *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987), and its failure to consider subsequent decisions which establish that the Third Circuit reviews entries of default and dismissals under the same deferential abuse of discretion standard as is used by other circuits.

Emcasco, 834 F.2d at 73, relies on an earlier case, *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868-70 (3d Cir. 1984), which considered the propriety of punitive dismissals and entry of defaults. *Poulis* is most commonly cited by the Third Circuit and district courts in that circuit in considering punitive dismissal and default issues.[7]

A 1992 decision, *Mindek v. Rigatti*, 964 F.2d 1369 (3d Cir. 1992), is instructive in establishing the evolution of the Third Circuit's approach to dismissals and defaults. In particular, and contrary to the position asserted by Petitioner herein, *Mindek* recognized that the *Poulis* factors "did not provide a magic formula whereby the decision to dismiss or not dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed by this Court." *Id.* at 1373.

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7. As indicated by *Poulis*' discussion of "whether the trial court has abused its discretion in dismissing, or refusing to lift a default," 747 F.2d at 868, dismissals, which end plaintiffs' claims, and defaults, which impact defendants, are subjected to the same analysis. However, and as discussed *infra*, courts approach defaults involving more than mere failure to answer and dismissals for failure to comply with rules and orders differently than defaults, as here, for failure to answer and promptly respond to motions concerning default and the court's entry of default.

The court in *Mindek*, however, went even further in stating:

> As we have already recognized, not all of the *Poulis* factors need be satisfied in order to dismiss a complaint. *See C.T. Bedwell & Sons, Inc. v. Int'l Fidelity Ins. Co.*, 843 F.2d 683, 696 (3d Cir. 1988). Instead, the decision must be made in the context of the district court's extended contact with the litigant. Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court — a court which has no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted.
>
> Although we have held that "[d]ismissal is a harsh remedy and should be resorted to only in extreme cases," we nevertheless have recognized that "the scope of appellate review of an order of dismissal is extremely narrow, confined solely to whether the trial court has abused its discretion." *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

Id.

The court in *Mindek* then cited this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778 (1975):

> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district

> court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

964 F.2d at 1374, quoting *National Hockey League*, 427 U.S. at 642-43, 96 S. Ct. at 2780-81.[8] Based on the foregoing, the Third Circuit in *Mindek* affirmed the district court's dismissal of the plaintiff's complaint. 964 F.2d at 1375.

As the above discussion indicates, the Third Circuit uses the same deferential abuse of discretion standard as other Circuits, and this Court has provided guidance on similar issues. In fact, it is not difficult to imagine any circuit, faced with the chronology recited by the Eleventh Circuit in its decision in this case, reaching the same conclusion: that Petitioner's "contention that the district court abused its discretion by entering a default judgment is frivolous. The court did not err in denying defendant's motion to set aside the default."

---

8. In *National Hockey League*, this Court considered the propriety of a dismissal under Fed. R. Civ. P. 37 for failure to timely comply with a district court's order to answer interrogatories. This Court reversed the Third Circuit, holding that the district court did not abuse its discretion in dismissing the case. 427 U.S. at 643, 96 S. Ct. at 2781.

C. The Cases Relied On By Petitioner Do Not Require Consideration Of Other Sanctions In Cases, As This, Where Default Is Entered For Failure To Answer And Promptly Respond To Motions Concerning Default And The Court's Entry Of Default

The cases relied on by Petitioner do not support Petitioner's contention that those circuits require "consideration of lesser sanctions where a defendant failed to answer in a timely fashion." (Petition at 19). Petitioner itself impliedly admits that this statement is not correct in that Petitioner later states that those cases indicate that "under certain circumstances," lesser sanctions must be considered. (Petition at 20).

Petitioner's reliance on *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982), is misplaced. The court therein stated that "[i]n the circumstances, we believe that since the District Court is permitted to impose less severe sanctions, it was not justified in refusing all relief." *Id.* at 728. This is *not*, as suggested by Petitioner, tantamount to a statement that a court must consider "lesser sanctions where a defendant failed to answer in a timely fashion."[9]

9. As mentioned, the court in *Moradi* focused on the "circumstances" which involved a timely filed *and served* answer that the court returned to counsel's office. Counsel did not learn of the return of the answer or subsequent notices because of his hospitalization. A motion for relief was filed immediately upon learning of the award of a default judgment. That decision is inapplicable to the case at bar in which there is no record of an answer having been filed; the alleged answer was not served, even though an extension motion was served; the motion for relief was filed three months after default was entered; and the failure to properly and promptly act was caused by the party — Petitioner — not an attorney. The court in *Moradi* emphasized that a party personally at fault, as here, is to be treated more harshly than a party whose counsel was at fault. 673 F.2d at 728.

Petitioner's reliance on *Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc.*, 856 F.2d 873 (7th Cir. 1988), is not merely misplaced; Petitioner misrepresents the decision. Petitioner characterizes the default judgment in that case as "entered primarily based on defendant's failure to file an answer." (Petition at 20). The court stated just the opposite, emphasizing that the case "does not simply involve failure to file an answer." *Id.* at 880.

Prior to making that statement, the court noted that it was much more inclined to uphold defaults for failure to answer: "the failure to file an answer when due is a serious default. We have upheld refusals to vacate default judgments where a defendant has failed to file an answer." *Id.*

Nor did the court in *Anilina* hold, as Petitioner implies, that alternative sanctions always must be considered. The Court merely held that default judgment " 'was too harsh under the circumstances.' " *Id.* at 878 (citations omitted).

Anilina, as indicated, does not support Petitioner's position. In fact, the decision strongly suggests that alternative sanctions need not be considered where, as here, the case involves failure to answer.

Finally, even *Emcasco*, 834 F.2d 71, involved a complicated factual context in which the defendant was involved in various miscommunications and an answer was filed a mere six weeks after due. In contrast, in this Petitioner's case, as noted by the Eleventh Circuit:

> Counsel for defendant first appeared . . . ten months after defendant received a copy of the complaint through the mail and refused to waive

> service; seven months after personal service; six months after defendant requested extension of time to answer; four months after plaintiff requested a default; three months after default was entered and plaintiff moved for entry of judgment by default.

(App. A to Petition). Furthermore, as discussed *supra*, subsequent Third Circuit decisions reject the notion that all factors, such as lesser sanctions, must be considered in every case.

CONCLUSION

There is no reason for this Court to review an unpublished Circuit Court decision that summarily disposed of as "frivolous" Petitioner's argument that the district court abused its discretion by entering a default judgment. For this and the other reasons discussed herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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